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FILED

MAY 02 2011

TAMARA C. MARSHALL, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In Re:

QUE JAY FULLMER and
DEBORA JEAN FULLMER,
d/b/a FULLMER CATTLE COMPANY et al.,
Debtors.

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Case No. 09-50086-rlj-11

**MOTION FOR RELIEF FROM AUTOMATIC STAY NUNC PRO TUNC AND TO
DEEM PROOF OF CLAIM ALLOWED AS TIMELY FILED**

TO THE HONORABLE ROBERT L. JONES, United States Bankruptcy Judge:

COMES NOW, JUAN GARCIA and WENDY GARCIA ("Garcia"), creditors in the above-referenced bankruptcy case, and file this their *Motion for Relief From Automatic Stay Nunc Pro Tunc and to Deem Proof of Claim Allowed as Timely Filed* (the "Motion"), and in support thereof would respectfully show unto the Court as follows:

1. Que Jay Fullmer and Debora Jean Fullmer along with eleven (11) of their affiliated entities, including Fullmer Cattle Company New Mexico, LLC ("Fullmer Cattle Company")(hereinafter collectively referred to as the "Debtors"), filed for relief under Chapter 11 of the United States Bankruptcy Code on March 2, 2009.

2. On November 30, 2009, the Debtors' Amended Consolidated Plan of Reorganization ("Plan") was confirmed by order of this Court [Docket No. 604]. Pursuant to the

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provisions of the Plan, the "Fullmer Liquidating Trust" was established with Jeff Carruth appointed as trustee of the Fullmer Liquidating Trust.

3. Juan Garcia ("Garcia") was employed with Fullmer Cattle Company until October 31, 2006.

4. On October 31, 2006, Garcia sustained substantial and serious injuries during the course and scope of his employment with Fullmer Cattle Company.

5. Neither Garcia nor his counsel were aware that Fullmer Cattle Company had filed for bankruptcy relief on March 2, 2009, and at no time did Garcia or his counsel receive notice of the Debtors' bankruptcy filing.

6. Garcia filed suit against Fullmer Cattle Company on March 28, 2008, in the First Judicial District Court, Santa Fe County, New Mexico (the "New Mexico Suit").

7. Garcia properly served the citation and petition of the New Mexico Suit by first class mail and certified mail on Fullmer Cattle Company's registered agent.

8. Receipt of the certified mail was signed on April 28, 2008.

9. The New Mexico court subsequently ruled that service was proper and effective.

10. After Fullmer Cattle Company failed to answer the suit, the New Mexico court granted default judgment in favor of Garcia on October 19, 2010. Upon hearing expert testimony as to the damages sustained by Garcia, the court also awarded Garcia \$1,521,951.51 in damages.

11. On November 2, 2010, Garcia's counsel learned about this bankruptcy case that had been pending during the state court proceedings.

12. While Garcia's filing of the New Mexico Suit and his obtaining a default

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judgment were arguably violations of the automatic stay for which he was not aware, said actions taken by Garcia in the state court proceedings are voidable, not void. The Fifth Circuit has recognized that "[i]t is well-settled that actions 'taken in violation of the automatic stay are not void but rather they are merely voidable, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d).' " *Jones v. Garcia*, 63 F.3d 411, 412 (5th Cir.1995) (quoting *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir.1990)) (citing *Sikes v. Global Marine, Inc.* 881 F.2d 176 (5th Cir.1989)); *In re Nazu, Inc.*, 350 B.R. 304, 325 (Bankr. S.D. Tex. 2006). This allows the Court to deem actions that would otherwise have been void, to be valid and enforceable claims under certain circumstances. The court's power to annul the stay works retroactively to validate actions taken by a party who was unaware of the existence of the stay. *See Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178-79 (5th Cir. 1989).

13. The United States Bankruptcy Court for the Southern District of Texas, Houston Division, had a case with similar facts to that of the case at bar. *See In re Nazu, Inc.*, 350 B.R. 304, 308-09 (Bankr. S.D. Tex. 2006). After the debtor filed bankruptcy and the stay had commenced, a state court action was filed against the debtor. *See Id.* While the debtor had notice of the state court action, it did not respond to the notice, notify the potential creditor or creditor's counsel, or schedule the creditor in the bankruptcy. *See id.* The bankruptcy court held that:

Accordingly, this Court finds that Farr's actions unknowingly taken in violation of the automatic stay—i.e., seeking the Default Judgment *Nunc Pro Tunc*, obtaining the Abstract of Judgment, and attempting to execute on the Default Judgment *Nunc Pro Tunc*—are not void. This Court therefore grants Farr relief from the automatic stay retroactively to the date of the Debtor's filing of its petition, so that her actions in violation of the automatic stay are not void and are hereby validated. As such, Farr's Claim will be allowed and paid pursuant to the confirmed plan in this case.

See Id. at 325-26. The bankruptcy court used the same reasoning as in *Jones* applying equitable

considerations where the creditor was without actual knowledge of a bankruptcy petition. *See Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412-13 n. 5 (5th Cir.1995).

14. The Debtors' failure give notice of this bankruptcy case to Garcia and failure to respond to the state court action once service was completed are grounds for this Court to annul the stay as to Garcia and retroactively validate the suit. Moreover, the court should allow for this then valid claim to be treated as a timely filed claim pursuant to Rule 3003(c)(3).

WHEREFORE PREMISES CONSIDERED, Juan and Wendy Garcia, creditors herein, respectfully request that the Court enter an Order allowing relief from the automatic stay nunc pro tunc and that their unsecured proof of claim be allowed as a timely filed, and further pray that the Court grant the Garcias such further relief as they may show themselves justly entitled.

Dated: 5/2/11

Respectfully submitted,

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By: 

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State Bar No. 24012437
Attorney for Juan and
Wendy Garcia

IMPORTANT NOTICE

PURSUANT TO LOCAL BANKRUPTCY RULE 3007, YOU ARE HEREBY NOTIFIED THAT NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1205 TEXAS AVE., ROOM 306, LUBBOCK, TEXAS 79401 WITHIN

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TWENTY-ONE (21) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF OR THE NOTICED ACTION MAY BE TAKEN.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion* was served via United States Mail or electronically serviced to the following parties on this 2nd day of ~~April~~, *May* 2011:

1. U.S. Trustee
1100 Commerce Street
Room 9C60
Dallas, TX 75242
2. David R. Langston
Mullin, Hoard & Brown, L.L.P.
P.O. Box 1738
Lubbock, TX 79408
Attorney for Debtors
3. Jeff Carruth
Weycer, Kaplan, Pulaski & Zuber, P.C.
3030 Matlock Rd., Suite 201
Arlington, Texas 76015
Fullmer Liquidating Trustee
4. All parties in interest registered with the
U. S. Bankruptcy Court to receive electronic
notices in this case.

All other parties having filed proof of claims that are pending distribution by the Fullmer Liquidating Trust.

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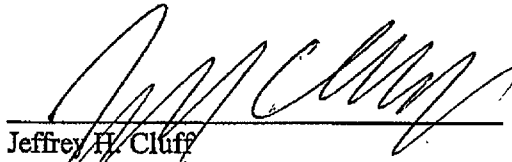
5. Access Group
P.O. Box 390
Hereford, TX 79045-0390
6. Calca Products Co., Inc.
P.O. Box 616
Acampo, CA 95220
7. Cemex Construction Materials South, LLC. c/o Ben L. Aderholt
Looper Reed & McGraw, P.C.
1300 Post Oak Boulevard,
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8. Cemex Construction Materials South, LLC
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Houston, TX 7056-8000
9. David Jackson Farms
Albert J. Berryman, Esq.
Baker Manock & Jensen, PC
5260 N. Palms Ace., Ste. 421
Fresno, CA 93704-2222
10. American Ag Credit, ACA
c/o Stephen Silan
P.O. Box 1120
Santa Rosa, CA 95402
11. Farm Credit Bank c/o Max R. Tarbox
2301 Broadway
Lubbock, TX 79401
12. Genske, Mulder & Company, LLP
1835 Newport Blvd.
Suite D-263
Costa Mesa, CA 92627-5013
13. J.D. Heiskell Holdings, LLC
601 Ave K
Lubbock, TX 79401
14. Panorama Construction, Inc.

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14. Panorama Construction, Inc.
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15. Peter Belezouli
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16. Syracuse Food Center
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Syracuse, KS 67878-1205
17. Syracus Inn, Inc.
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Syracuse, KS 67878-1205
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Tulare, CA 93275-1379
18. The Access Group
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Hereord, TX 79045-1701
19. The Access Group, Inc.
c/o Jerry Smith
Attorney For the Access Group, Inc.
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20. Unifeed Hi-Pro
c/o Andy aycock
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21. Western Milling
Department 9287
Los Angeles, CA 90084-9287
22. Western Milling, Inc.
Attn: Mark La Bounty
P.O. Box 1029
Goshen, CA 93227-1029

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23. Wayne Copley
Wayne Copley Trucking
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Muleshoe, TX 79347-0063



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